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Supreme Court, U.S.
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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM 1958

No. [redacted] 77

WHITNEY D. HAMMOND, Administrator of the Estate of Jim Eskridge, Deceased,

Respondent,

vs.

ZELPH S. CALDER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND/OR TO THE FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY, STATE OF UTAH.

ZELPH S. CALDER
251 So. 3rd West
Vernal, Utah

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM 1958

No. .....

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CITATION OF OPINION

334 Pac. 2nd 562 and is printed infra p. 8

FOREWORD

1. To refuse petitioner Calder's request that Respondent Eskridge post a non-resident cost bond deprives Calder of his statutory and constitutional rights.

2. Calder was condemned before he was heard, by being compelled to pay his lessees wheat penalty.

JURISDICTION

The opinion of the Supreme Court of Utah was filed January 21, 1959. Calder was given until February 24th, 1959 to file Petition for Rehearing. (Ut. Sup. Ct. R.) Said petition, filed February 24, 1959. It was denied and remittitur sent down to the 4th Judicial District Court of Uintah County March 3, 1959. (See Crt. R.)

QUESTIONS PRESENTED

1. Should Calder win a dismissal without prejudice for Eskridge's failure to file a non-resident cost bond as requested by Calder?

2. Was it due process of law for the court to mandamus Calder to pay Eskridge's excess wheat penalty without notice or opportunity to be heard?

STATUTE INVOLVED

1. Utah Rule of Civil Procedure 12 (j) and (k) and Section 104-44-17 and 18, Utah Code 1953 provides: (j) When the plaintiff is a non-resident he "shall", upon request by defendant, post a cost bond. the proceedings "shall be stayed". (k) If not filed within one month "the court shall, upon motion of the defendant, enter an order dismissing said action". (See Calder's petition for Rehearing, p. 2) Constitution of Utah, Art. XII, Sec. 6 provides: No foreign corporation shall be allowed to do business in this state on more favorable terms than a corporation of

this state. The United States Constitution Article I, Sec. 10 provides: No state shall * * * pass any * * * ex post facto law.

2. The U. S. Constitution, XIV amendment Sec. 1, provides that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 13, 1955, Eskridge, a non-resident share-cropping lessee (1/4 of the crop to the lessor, 3/4 to lessee) brought injunctive trespass against Calder, lessor. (Record p. 1) On October 18 "restraining order issued upon filing a bond" in the sum of $500 (R. 8). Bond was never filed. Also Calder's request for Eskridge to file a cost bond of $300 (R. p. 7) was never filed. On October 29 Eskridge was killed in an airplane accident. On November 15, 1955 court gave Eskridge 30 days extension of time to file non-resident cost bond. (R. p. 10).

Dec. 17, 1955 Calder served and filed motion to dismiss because Eskridge had failed to file a non-resident cost bond. (R. p. 11). Jan. 9, 1956 Wilma Eskridge, widow of deceased plaintiff, filed a petition requesting the appointment of Whitney D. Hammond as administrator to carry on the action commenced against Calder by her late husband, praying "said estate be considered nominal for the purpose of fixing bond." (R. p. 84). On Jan. 24th defendants motion to dismiss was denied. (R. p. 13).

June 25, 1956 stipulation entered into settling case, by Calder agreeing to pay 2/7 of the cost of clearing 658 acres (of sagebrush land). (See Calder's brief p. 4 R. 35).

2. On October 16, 1956 plaintiff "moved the court for an order and judgment based on the stipulation entered into between the parties on the 25th day of June, 1956" (Calder's brief, p. 12 R. 38) and the report of the arbitrators, dated October 15, 1956, (R. 36). Notice of Motion and Service Made, (R. 37) calling motion to be heard October 23, 1956 (R. 38), also notice to Calder that arbitrators had filed their report awarding $12 per acre for clearing 658 acres. (Calder's brief, p. 5).

On October 20 arbitrator Goodrich served and filed a request for withdrawal of award of arbitrators because he had not seen the stipulation. Goodrich placed his award at $3 per acre. (R. 40—Calder's brief p. 6).

On October 23, 1956 the trial court issued an order permitting Eskridge "to sell all his share of the wheat harvested on defendant's property in 1956; to wit, 4082 bushels, without penalty", and the defendant is hereby ordered to refrain from any act or action which will in any way prevent or hinder the issuance of a marketing card by the Uintah County Agricultural Stabilization and Conservation Committee authorizing and permitting plaintiff to market 4082 bushels of wheat without penalty, and the "defendant is further

ordered to perform any act it may be required by said committee to procure the issuance of said marketing card." (Calder's brief p. 6). October 31, 1956 Calder posted a bond of $2972.46 to insure payment of excess wheat penalty (Calder brief p. 9 R. 42). On November 2, 1956 Eskridge posted a $2,000 administrator's bond. (R. p. 85½).

REASONS FOR GRANTING WRIT

1. The opinion Supra of the Utah Supreme Court, second paragraph, line 8, says: "On December 7 defendant moved to dismiss, etc." December 7 is error. The record shows that it was December 17, two days after the one month statute of limitations had expired. (See Calder's petition for rehearing, supplement p. 6). This case should have ended here because the statute of limitations had run and death does not stay the statute.

The said opinion also is in error by saying in the last sentence "that a $2,000 surety bond was posted to protect the defendant". Eskridge posted an administration bond of $2,000 eleven days after mandamus was issued and three days after Calder had paid Eskridge's excess wheat penalty with a $2972.46 bond. Calder also suffered loss of a year's wheat crop, for which he had no recourse against Eskridge.

The facts force the conclusion that the said opinion is "a retroactive decision * * * and is as vicious as an ex post factor statute". Chambers *v.* Baker, 131 Fed. 161, 69 L.R.A. 653.

Mr. Justice Henroid in the opinion comments on the Bunting and Kemper cases being the law of this state and controlling. Both of these cases gave relief to the non-resident plaintiff by modifying the trial courts judgment of dismissal with prejudice to judgment without prejudice. Calder is only seeking a dismissal without prejudice so that, a resident, can then have his constitutional right to meet Eskridge, a non-resident, on an equal basis, also, the statute supra "stays all proceedings". Hence, all proceedings before Nov. 2, 1956 was a nullity.

2. "Without Penalty", as is recited in the next to the last paragraph of the opinion, makes an entirely new contract involving a greater consideration than the brush clearing contract stipulated by the parties. Eskridge had the right without even reciting it to sell his wheat under Calder's wheat allotment, which included both of them. The part that concerns this court is Calder receiving a mandate from the trial court to pay Eskridge's wheat penalty, carrying a punishment for contempt if he did not. There was no reservation of stay, no pleading for an alternate writ, affidavit, notice or hearing requesting such an order nor no bond posted by Eskridge to indemnify Calder in case such an order was found to be erroneous.

It is held in *Francisco v. Board of Dental Examiners*, Tex. 149 S.W. 2nd 169 "the fact that judicial review of the order is accorded does not satisfy 'due process of law' if no stay of the effect of the order is

provided and is meanwhile irreparable injury would result subjecting the party to criminal prosecution for its violation." In the case a dentist's license had been revoked upon alleged grounds he had committed a felony.

CONCLUSION

The consideration in this case might seem small to this court, but it is large to this litigant and his constitutional rights are still larger.

WHEREFOR, Calder prays that this case be sent back to be tried on its merits.

Respectfully submitted,

ZELPH S. CALDER
251 So. 3rd West
Vernal, Utah

Acknowledges receipt of 2 copies of the foregoing petition this ..... day of May, 1959.

.....

COLTON & HAMMOND
First Security Bank Bldg.
Vernal Utah

This is to certify that I mailed 2 copies of the foregoing petition to Van Cott, Bagley, Corwall & McCarthy, Sterling D. Colton at 65 South Main, Salt Lake City, Utah on ..... day of May, 1959.

IN THE SUPREME COURT
of the
STATE OF UTAH

WHITNEY D. HAMMOND,
Administrator of the Estate of
Jim Eskridge, Deceased,
Plaintiff and Respondent,
vs.
ZELPH S. CALDER,
Defendant and Appellant.

No. 8827

HENROID, Justice:

Appeal from a money judgment and the denial of a motion to dismiss for failure to file a cost bond. Affirmed with costs to respondent.

In 1950 defendant leased *virgin, untilled* land to one Eskridge for an 8 year term, defendant to get ¼ of the crops grown. The land was broken and farmed. On October 13, 1955, Eskridge sued to restrain defendant from permitting his *stock to damage a wheat crop growing on the land and for damages.* On October 18, defendant demanded a non-resident cost bond.[1] Eskridge died on October 29. Within 30 days and on November 15, plaintiff's attorney moved for an exten-

1. Rule 12(j), Utah Rules of Civil Procedure, requires a non-resident litigant to file a cost bond within 30 days after demand made therfor.

sion to file the bond because of plaintiff's death and in order to have an administrator appointed and substituted as party plaintiff. A 30 day extension was granted. On December 7 defendant moved to dismiss with prejudice for failure to file the bond within 30 days as required by Rule 12 (j). On January 9, Eskridge's widow moved to deny this motion since she had asked that plaintiff Hammond be appointed administrator. On January 12, defendant's motion to dismiss was denied. The administrator later was appointed and posted a $2,000 surety bond.

Thereafter the parties waded through a sea of pleadings, conferences and arguments and the suit initiated to enjoin defendant changed complexion and developed into something akin to a simple suit for damages. All differences were to be resolved by a stipulation entered into on the date of the trial in June, 1956, which called for harvesting and dividing, 1/4 to defendant and 3/4 to Eskridge, of the crops for that year, termination of the lease, defendant to pay Eskridge 2/7 of the cost of "clearing" the land in 1951, such cost to be determined by two appraisers, one to be chosen by each of the parties, Eskridge to remove his property from the land, to turn over immediately the north portion of the farm, all claims between the parties to be settled and "the plaintiff shall have the right to sell his share of the wheat under the wheat allotment of the defendant."

Appraisers were appointed and a writing signed by them was delivered to the court setting the cost of

"clearing" at $12.00 per acre. A few days later the appraiser appointed by defendant asked to withdraw his appraisal and signed an affidavit in which, in substance, he asserted that he had signed too hastily. Evidence was later taken by the court and there is substantial testimony to justify the court's determination that the cost intended by the parties included the plowing, which fact appellant denies, and that the $12 figure was reasonable, such that we do not feel constrained to upset the finding, thus disposing of one of defendant's assigned errors.

Defendant's other errors attack 1) the court's refusal to dismiss for failure to file a cost bond, 2) in adjudging that Eskridge was entitled to sell his wheat under defendant's allotment without penalty, 3) in awarding costs to plaintiff and 4) in refusing to hear defendant's claim that Eskridge removed a granary from the premises.

Treating the assigned errors in reverse, in January, 1958, long after the trial and entry of judgment defendant filed what appears to have been an abortive pleading called "Defendant's Request for Claim Against Plaintiff," claiming to own the granary Eskridge built and removed from the property. We think the court properly refused to entertain the matter. As to the award of costs, under Rule 54(d)(1) costs are allowed to the prevailing party and defendant's reason why he should be awarded costs, that equity would be done, does not seem meritorious under the finding or the rules.

As to the right of Eskridge to sell his wheat under defendant's allotment without penalty, it would seem that the plain wording of the stipulation reasonably lends itself to a construction meaning just that, and the trial court having so construed it, we sustain him.

As to the failure to file the cost bond within the thirty day period, this court has held in *Bunting Tractor Co.* v. *Ford*[2] that failure to file such bond within the prescribed limits but before motion to dismiss, necessarily does not require dismisal with or without prejudice, and in *Kemper* v. *Clarite Battery, Inc.*,[3] that filing such bond even after the motion to dismiss has been made does not require dismissal. This writer suggested in those two cases that Rule 17(j) may have disappeared, but they are the law of this state and controlling. It would seem that in the light of those cases, in view of the fact that a death had made impossible the filing of such bond within the prescribed time, *the fact that timely request was made for time to file it by an administrator who could not have qualified within the time*, and the fact that a $2,000 surety bond was posted to protect defendant, justify an affirmance of the trial court's refusal to dismiss the litigation.

2. 2 Utah 2d 275, 272 P.2d 191 (1954).
3. 2 Utah 2d 280, 272 P.2d 194 (1954).

WE CONCUR:

J. Allan Crockett, Chief Justice

Lester A. Wade, Justice

Geo. W. Worthen, Justice

Roger I. McDonough, Justice

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CARMEN M. LOHR,

Petitioner,

vs.

UNITED STATES OF AMERICA, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TURNER, HENDRICK,
FASCELL & BRAKE,
Attorneys for Petitioner.

ROBERT M. BRAKE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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CARMEN M. LOHR,

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UNITED STATES OF AMERICA, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW the Petitioner, CARMEN M. LOHR, by and through her undersigned attorneys and respectfully petitions this Honorable Court for a Writ of Certiorari to review that certain Order of the United States Court of Appeals for the Fifth Circuit entered in that certain cause wherein your Petitioner, CARMEN M. LOHR, was Appellant and THE UNITER STATES OF AMERICA was Appellee, and which Order granted said Appellee's Motion to Dismiss said appeal for alleged failure by Petitioner to file a timely Notice of Appeal, and shows unto this Honorable Court as follows:

OPINIONS BELOW

The Opinion of said Court of Appeals granting said Motion to Dismiss has not yet been assigned a page number in the official and unofficial reports of the Opinions of said Court as of the date of printing this Petition.

BASIS OF JURISDICTION

Jurisdiction is conferred on this Court by the following:

a) The Order granting said Motion to Dismiss, and the Opinion of the Court of Appeals thereon, were dated and filed on March 20, 1959.

b) The Order denying Petitioner's Petition for Rehearing was dated and filed on April 16, 1959.

c) Section 1254, Title 28, U.S. Code, confers jurisdiction on this Court to review said Order by Writ of Certiorari granted upon this Petition.

QUESTION PRESENTED

The question presented for review is as follows:
WHERE THERE ARE FOUR DEFENDANTS IN A DISTRICT COURT ACTION AND ONE DEFENDANT IS DISMISSED, AND A NOTICE OF APPEAL IS IMMEDIATELY FILED AS TO SUCH DISMISSAL, AND LATER THE REMAINING DEFENDANTS ARE DISMISSED, BUT NO NEW NOTICE OF APPEAL IS FILED AS TO THE FIRST DEFENDANT, IS THE NO-

TICE OF APPEAL AS TO SAID FIRST DEFENDANT SUFFICIENT TO GIVE THE COURT OF APPEALS JURISDICTION OF THE APPEAL, OR MUST A NEW NOTICE OF APPEAL BE FILED, EVEN THOUGH THE CASE HAS BEEN DOCKETED AND THE RECORD PRINTED AND FILED WITH THE COURT OF APPEALS?

STATUTES INVOLVED

The statutes involved in this matter are as follows:

(1) 28 U.S.C. Sec. 1291, 62 Stat.929, as amended,65 Stat.726, 72 Stat. 348:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(2) 28 U.S.C. Sec 2107, 62 Stat. 963, as amended 63 Stat. 104:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry . . ." (Remainder of section not applicable).

(3) 28 U.S.C. 2111, 63 Stat 105:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioner, as Plaintiff below, brought an action against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671, and against two individual agents of the United States and against an alleged joint tortfeasor, for the wrongful death of her husband, an airline pilot. Her complaint alleged that the aircraft had been converted from military to civilian use by use of parts which differed from those specified by the Civil Aeronautics Administration; that the difference could have been and should have been discovered by the Civil Aeronautics Administration inspector and the plane should not have been allowed to fly in the United States; and that the parts in question caused the plane to crash while in flight, killing her husband, who was the pilot of the plane.

The two individual government agents were not Florida residents and could not be served. Only the United States and Riddle Airlines, Inc. as employer and joint tortfeasor, were served.

On August 11, 1958, the District Court entered an Order dismissing the Complaint as to the United States. On August 25, 1958, Petitioner filed her Notice of Appeal from this Order. Thereafter the employer, Riddle Airlines Inc. was granted a summary judgment on November 12, 1958, based upon the Florida Workmen's Compensation Law.

On December 5, 1958, Respondent filed a Motion to Dismiss the appeal in the Court of Appeals on the grounds that inasmuch as the case below was still pending against the two non-resident and unserved defendants, the order dismissing the United States was not a final order within the meaning of 28 U.S.C. 1291. Petitioner took a nonsuit against said unserved defendants on December 9, 1958, and filed a certified copy of said Order Granting Nonsuit with the Court of Appeals.

No new Notice of Appeal from the Order Dismissing the Complaint as to the United States was thereafter filed.

On March 9, 1959, the cause was orally argued before the Court of Appeals, both on the Motion to Dismiss and on the merits of the appeal. On March 20, 1959, the Court of Appeals entered an Order dismissing the appeal, and, after a Petition for Rehearing had been filed by Petitioner, the Court of Appeals entered an Order denying said Petition for Rehearing on April 16, 1959.

ARGUMENT

The decision of the Court of Appeals is in conflict with the decision of this Court in Lemke vs U.S. 1953, 346

U.S. 325, 74 S.Ct. 1, 98 L.Ed. 3, in which case Petitioner believes this court settled the question of proper procedure where a premature notice of appeal has been filed. The case at bar is almost identical with the Lemke case, differing only in that the Lemke case arose under the Criminal Procedure Rules.

In the Lemke case the sentencing procedure on March 10 did not result in a final order within the meaning of the appeals statutes. On March 11 a premature notice of appeal was filed. On March 14 an order was entered making the proceedings final. Thereafter the Court of Appeals dismissed the case on the grounds that the Notice of Appeal was premature inasmuch as Criminal Rule 37 (a) (2) provided that an appeal "may be taken within 10 days after entry of a judgment or order appealed from . . .", and that the subsequent entry of an order making the proceedings final did not cure the premature notice. The Supreme Court reversed the Court of Appeals and held that the premature notice was cured when the case became final before the appeal was heard. Criminal Rule 52 (a) providing that any error not affecting the substantive right of the parties should be disregarded was cited as authority for the decision.

The similarities between the Lemke case and the case at bar are glaring:

(a) In both cases the procedure for taking an appeal was by filing a Notice of Appeal in the Trial Court (Civil Rule 73, 28 U.S.A. 2107; Criminal Rule 37 (a) (2)).

(b) In both cases the notice of appeal was filed before the order appealed from became final.

c) In both cases the order became final after the notice had been filed but before the Court of Appeals had heard argument.

d) In both cases statutes and rules provided that errors not affecting substance should be disregarded (28 U.S.C. 2111, Civil Rule 61; Criminal Rule 52 (a)).

e) In both cases the substantive rights of the parties were not affected, and the procedural requirements of early notice and an opportunity to be heard were fully met.

In similar situations many State Supreme Courts have held as did this Court (Schubert v. School District No. 85, Spartanburg County, 168 S.E.391, 169 S. C. 191; Appeal of Hull, 82 Conn, 386, 73 A. 793; Hays v.s. Dennis, 11 Wash 300, 39 P 658) that a premature notice of appeal is cured when the order becomes final before the appeal is heard.

In addition, the Lemke case has been followed in state civil proceedings. Texas Employment Commission et al vs. Stewart Oil Company, 153 Tex. 251, 267 S.W.2d, 138.

The Court of Appeals apparently relied on the case of U.S. v. Crescent Amusement Company, 1944, 323 U.S. 173, S. Ct. ; L. Ed. . However, that case is not applicable to the case at bar, since it differed in many respects from the Lemke case and the case at bar:

a) It involved a direct appeal to this Court from a District Court under 15 U.S.C. 29;

b) The appeal procedure was by petition and order under old section 345, Title 28, prior to the 1948 Amendments; and

c) The merits of the case were actually presented to the Court, since two appeals were filed and only the premature one was stricken.

The construction of the statute adopted by the Court of Appeals is not within the spirit of the 1938 Federal Rules of Civil Procedure and the 1948 amendment to the Judiciary Code. As said by the Washington State Supreme Court in Hays v. Dennis, 11 Wash 300, 39 P 658 at 659:

> "The statutes governing appeals should be liberally construed, to the end that parties may have a review by this court of the rulings of the superior courts when they so desire. The appeal statute thus construed will require us to give force to a notice of appeal given after the court had announced its decision, although it was before the signing and entering of the formal judgment. For some purposes the judgment may not be complete until thus signed and entered, but, after such announcement, it was so far complete as to sustain a notice of appeal".

To adopt the construction of the Court of Appeals would be to require the preparation and filing, in two courts, of an added and duplicate piece of paper which would serve no practical purpose and would not affect the substantive rights of the parties in any manner whatsoever.

"To insist upon the (petitioner's) subsequently filing a duplicate set of papers *** would be a retreat into formalism wholly inconsistent with the spirit of the *** rules of Civil Procedure" Texas Employment Commission et al vs. Stewart Oil Company, 153 Tex. 251, 267 S.W. 2d, 138.

By reason of the above, Petitioner believes that the Court of Appeals was in error in granting respondent's motion to dismiss the appeal and prays that this court grant a Writ of Certiorari to review said decision.

RESPECTFULLY SUBMITTED,

TURNER, HENDRICK,
FASCELL & BRAKE,
Attorneys for Petitioner.

By_____
ROBERT M. BRAKE

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed March 20, 1959 (Caption omitted).

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge

PER CURIAM: This suit was filed on June 24, 1958, by Carmen M. Lohr against several defendants — the United States of America, the Civil Aeronautics Administration, an agency of the United States of America; Riddle Airlines, Inc., a Florida Corporation; Sandy & Company; and Hector Alexander — to recover damages for the death of plaintiff's husband, a commercial airline pilot who was killed in the crash of a C-46 type aircraft operated by Riddle Airlines near Hollywood, South Carolina on December 17, 1955.

On August 12, 1958, the district court entered an order dismissing with prejudice the second amended complaint as to the defendant United States of America for failing "to show a duty owing the plaintiff by the United States of America, or the Civil Aeronautics Administration for which a cause of action would lie under the Federal Torts Claims Act". On August 25, 1958, this appeal was taken from that order. After the filing of the Notice of Appeal, a motion for summary judgment was granted for Riddle Airlines Inc. on November 12, 1958, and plaintiff was allowed a voluntary non-suit as to the defendants Sandy & Company and Hector Alexander on December 9, 1958, neither of whom had been served with process.

On December 5, 1958, the appellee, United States of America, filed in this Court a motion to dismiss the appeal on the ground that "the order dismissing as to the United States is interlocutory only and not a final decision under 28 U.S.C.A. 1291, since the suit is still pending in the district court against defendants Sandy & Company and Hector Alexander, who have not yet been served". This motion further alleged that:

> "Because the case involves a single claim asserted against multiple defendants, it must 'be governed by the line of cases which have held that an appeal cannot be taken from the lower court's order dismissing one or several defendants while there remains a controversy as to the other defendants on the same claim'. Reagan v. Traders and General Insurance Co. 255 F.2d 845, 847 (C.A. 5). See also, United States v. Woodard, 257 F.2d 805 (C.A.5); Meadows v. Greyhound Corp. 235 F.2d 233 (C.A.5). This rule also applies to parties defendant who have not been served. They are still parties to the lawsuit and service may still be had on some or all of them. Hardy v. Bankers Life & Casualty Co. 222 F. 2d 827, 828 (C.A.7)."

The Motion to dismiss the appeal is well taken since this court is bound by the authorities cited.

Appellant in oral argument, however, insists that the subsequent non-suit taken as to the defendants Sandy & Company and Hector Alexander on December 9, 1958, four days after the motion to dismiss the appeal was filed, is sufficient to convert the district court's order of

August 12 dismissing the amended complaint from an interlocutory order into a final decision under 28 U.S.C.A. 1291 so that the notice of appeal would be timely made. In the alternative, appellant says that her appeal of August 25, 1958, even though taken from a non-appealable order was in the nature of a "continuing" or a "suspending" notice of appeal which attached to any final decision in the case; and that either the order granting the voluntary non-suit on December 9 constituted a final decision or it converted the order dismissing the United States as a party defendant into a final decision with effective date of December 9.

While in sympathy with appellant's plight, we cannot afford to give the Judicial Code or the Rules of Procedure any such fictional construction. Rule 73(a), F.R.C.P., states simply that "the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . ." (60 days where the United States is a party.) This "judgment appealed from" must be either a "final decision" under 28 U.S.C.A. 1291 or a certain "interlocutory decision" under 28 U.S.C.A. 1292. Here, the "judgment appealed from" was the order of dismissal of August 12, 1958. Compare: Lemke v. United States, 1953, 346 U.S. 325; U.S. v. Crescent Amusement Co. 1944, 323 U.S. 173, 177. It was neither a final nor an interlocutory decision of the kind which will support an appeal to this Court.

The appeal is therefore

DISMISSED.

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CARMEN M. LOHR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 78

CARMEN M. LOHR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Southern District of Florida (R. 7) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1–3) is reported at 264 F. 2d 619.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1959 (Pet. App. 1). A timely petition for rehearing was denied on April 16, 1959 (Pet. 2). A petition for a writ of certiorari was filed May 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals acquires jurisdiction of an appeal noted before the order appealed from is final because of subsequent action by the district court with respect to the remainder of the case.

STATUTE AND RULE INVOLVED

1. 28 U.S.C. 1291 provides in pertinent part as follows:

> Final decisions of district courts
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

2. Rule 73(a) of the Federal Rules of Civil Procedure provides as follows:

> (a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time

for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

STATEMENT

This is a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq.*, arising out of the certification as airworthy by the Civil Aeronautics Administration of a commercial aircraft which crashed while being flown by the petitioner's husband. The petitioner alleged that the United States had negligently certified the aircraft

to be airworthy, when in fact it was not, and that this was a proximate cause of the crash. In addition to the United States and its agency, the Civil Aeronautics Administration, the petitioner named as co-defendants the owner of the aircraft, Riddle Airlines, Inc., and two alleged agents of the Government, Sandy and Company, a corporation, and Hector Alexander, an individual (R. 1–5).

The petitioner's second amended complaint (R. 1) was filed on June 24, 1958, in the United States District Court for the Eastern District of Florida. On August 12, 1958, the second amended complaint was dismissed, with prejudice, as to the United States on the ground "that the allegations contained in the second amended complaint fail to show a duty owing the [petitioner] by the United States of America, or the Civil Aeronautics Administration for which a cause of action would lie under the Federal Tort Claims Act" (R. 7).

Although no disposition of the case had been made by the district court as to the co-defendants, Riddle Airlines, Sandy and Company, and Hector Alexander, the petitioner, on August 25, 1958, filed a notice of appeal from the order dismissing the case as to the United States (R. 8). Three weeks later, on September 15, 1958, the record with respect to this appeal was docketed in the Court of Appeals (R. cover). The district court, however, continued to exercise jurisdiction in the cause, and on November 12, 1958,

it granted a motion for summary judgment by Riddle Airlines[1] (Pet. App. 1).

On December 5, 1958, the United States filed a motion to dismiss the appeal against it on the ground that the case was still pending against Sandy and Company and Hector Alexander (Pet. App. 2). Immediately thereafter, counsel for the petitioner discontinued her case against Sandy and Company and Hector Alexander, who had never been served, by taking a voluntary non-suit as to them (Pet. App. 1).

The Court of Appeals heard argument both on the motion to dismiss the appeal and on the merits. Thereafter, on March 20, 1959, it held that the notice of appeal filed August 25, 1958, did not confer jurisdiction upon it because the judgment appealed from was not a final order (Pet. App. 1-3).

ARGUMENT

The petitioner recognizes that the appeal noted on August 25, 1958, was premature because her complaint was still pending against the three remaining defendants (Pet. 6). She argues, however, that this appeal, even though noted from a decision which was not final, later conferred jurisdiction on the Court of Appeals, because, while the premature appeal was pending, the district court disposed of her claims against one defendant and allowed a voluntary nonsuit as to the other two. This contention, which departs from well-recognized principles of appellate

[1] Riddle Airlines' motion was based upon the fact that the petitioner had received full compensation under the Florida Workmen's Compensation Law (Pet. 5).

jurisdiction, is not supported by *Lemke* v. *United States*, 346 U.S. 325, the only federal authority cited by the petitioner's counsel, or by any other federal decision. On the contrary, the decision below accords with rulings by this Court and other courts of appeals as to proper appellate practice. Further, it presents no question of general importance to the administration of appeals. Accordingly, this case does not merit review by this Court.

The Judicial Code provides (28 U.S.C. 1291, *supra*, p. 2) that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." Under present-day practice an appeal is taken simply by filing in the district court a notice of appeal. Fed. R. Civ. P. 73(a), *supra*, pp. 2–3. This notice is not a mere formality, however. It is a jurisdictional step, which, if effective, transfers all jurisdiction over the merits of the cause from the district court to the court of appeals (see, *e.g.*, *In re Federal Facilities Realty Trust*, 227 F. 2d 651, 653–654 (C.A. 7), and cases cited therein); consequently, "[m]ore is at stake than informing the appellee that the appellant is not content with the judgment." *Federal Deposit Insurance Corp.* v. *Congregation Poiley Tzideck*, 159 F. 2d, 163, 166 (C.A. 2). The notice of appeal serves as the signal for transfer of the cause, the point of demarcation between the relative powers of the district court and the courts of appeals over a specific case. *Id.*

Whether the notice is effective or not depends upon whether a final and, hence, reviewable decision has

been reached by the district court. There are no automatic formulae to determine this. It depends, of course, upon the intentions and actions of the district judge who bears the burden of decision. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227. But there can be no doubt that in this case there was no final appealable order until the case had been finally disposed of as to all of the parties the petitioner charged with joint liability for the death of her husband. See, e.g., *Oneida Nav. Corp.* v. *W. & S. Job & Co.*, 252 U.S. 521; *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262; *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. 2d 465 (C.A. 5), certiorari denied, 314 U.S. 647.

A decision may be "final" in the sense that a court of appeals has statutory jurisdiction to entertain it, and yet not be appealable because the judicial unit for purposes of appeal includes the whole case—all claims against all parties. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431–432, fn. 3. Appealability in the latter sense is also sometimes described in terms of "finality". But it is an aspect of finality which this Court may modify through exercise of its rule-making powers. 28 U.S.C. 2072; see Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 Harv. L. Rev. 1303. This has been done with respect to the unit for purposes of appeal in cases involving multiple claims. Fed. R. Civ. P. 54(b); see *Sears, Roebuck & Co.* v. *Mackey, supra.* But it has not been done with respect to closely interrelated claims against multiple parties. When such

claims are brought against multiple parties, the unit for appeal is still the whole case.[2] See, *e.g., Zarati S.S. Co. v. Park Bridge Corp.*, 154 F. 2d 377, 379 (C.A. 2), and cases cited therein.

Thus, when the petitioner filed her notice of appeal from the order dismissing her claim for failure to state a cause of action against the United States, there was no final judgment from which to appeal because the rest of the case was still pending against the three remaining parties defendant whom she charged with joint liability for the death of her decedent. The petitioner does not dispute this; nor does she deny that her appeal was consequently subject to dismissal so long as the case was still pending against the remaining defendants in the district court.

She argues, however, that the notice of appeal, even if ineffective when filed, could be made effective by subsequent action of the district court in disposing of the remaining claims. If this be so, there is no reason why cautious counsel should not regularly file a notice of appeal from each portion of a case as it is decided, and docket the record piecemeal in the higher court. Nor is there any just reason why an appellate court should ever dismiss a premature appeal—the

[2] In 1955 the Advisory Committee on Rules of Civil Procedure proposed that Fed. R. Civ. P. 54(b) be amended to permit entry of judgment as to a single party in a multiple party case upon an express direction to that effect by the district judge accompanied by a determination that there is no just reason for delay in disposition of that portion of the case. Report of Proposed Amendments to the Rules of Civil Procedure (1955) 54–55. This would have permitted appeals in multi-party cases in advance of disposition of the whole case. The proposal was not adopted.

matter should simply be held in abeyance until the district court has completed disposition of the remaining claims, *i.e.*, until the appellant has finished contesting those pieces of his case which are still in the court below. Obviously, this would be a radical departure from the long-standing policy against piecemeal appeals. See *Cobbledick* v. *United States*, 309 U.S. 323; *Parker* v. *United States*, 153 F. 2d 66, 69 (C.A. 1). If this principle is to be modified, it must be done through legislation or by changes in the rules of procedure, not through a single decision called forth by a procedural accident in an isolated case. Cf. *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314.

It is well established under the Federal Rules of Civil Procedure that a notice of appeal filed from an order which is not final does not confer jurisdiction upon the appellate tribunal to consider the merits of the cause, even though steps are subsequently taken in the district court to render the judgment final. This Court applied this doctrine in dismissing a direct appeal prematurely noted by the United States from a judgment which was not final because a motion to amend the findings was still pending in the district court. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173. And, like the court below, other courts of appeals have reached the same result. *Studer* v. *Moore*, 153 F. 2d 902 (C.A. 2); *Stevens* v. *Turner*, 222 F. 2d 352 (C.A. 7).

The *Studer* case is identical to the case at bar. Studer brought suit against the Comptroller of New York and the Irving Trust Company for a declara-

tory judgment that he was the owner of money deposited in the Trust Company and transferred to the Comptroller. He appealed from a judgment dismissing his complaint as against the Comptroller while the action against the Irving Trust Company was still undecided. After the argument of the case, he discontinued the action against Irving Trust Company at the suggestion of the court of appeals. But on further reflection the Second Circuit unanimously held that, "since the original appeal did not remove the cause, nothing done thereafter in the district court could supply its place. A new appeal must be taken." The appeal was dismissed.

Petitioner's reliance upon *Lemke* v. *United States*, 346 U.S. 325, is entirely misplaced. That case did not involve an appeal noted before a decision had become final, but an appeal noted from a final decision in a criminal case before that final decision had been formalized in a written judgment. The sentence itself was the final judgment. *Berman* v. *United States*, 302 U.S. 211, 212. Thus, this Court's holding in Lemke is simply that formalization of the sentence is not a jurisdictional prerequisite to an appeal by a defendant in a criminal case. An appeal noted before such formalization, therefore, is not premature.

The distinction between *Lemke* and this case is easily demonstrated. If, to presuppose a situation parallel to *Lemke*, the district court in this case had ordered orally that it be dismissed as to all parties defendant, and if petitioner had thereafter filed a notice of appeal from this order before it was formal-

ized in a written judgment and noted on the docket book, the notice of appeal might well become effective when the ministerial requirement of formal entry in the docket had been performed. "No form of words * * * is necessary to evince [the] rendition [of a judgment]." *United States* v. *Hark*, 320 U.S. 531, 534; *United States* v. *Schaefer Brewing Co.*, *supra*, at 232. But in this case, unlike *Lemke*, there was no final decision at all when the notice of appeal was filed, nor could there be a final decision until the case was disposed of as to the remaining parties.

Equally inapplicable are the authorities from the state courts cited by petitioner, since all of them arose under jurisdictional provisions and codes of practice materially different from those obtaining in the federal courts.

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[3] We believe it also appropriate to note still an additional and independent reason for not granting certiorari in this case. Examination of two specific exclusionary provisions of the Tort Claims Act makes it plain that the district court did not have jurisdiction to award damages to plaintiff against the United States under the Tort Claims Act. The gravamen of her complaint was that the Civil Aeronautics Administration had, in an official certificate of airworthiness, negligently represented the aircraft in which her husband perished to be airworthy when in fact it was not. Actions for misrepresentation, whether negligent or willful, are expressly excluded from the scope of the Tort Claims Act. 28 U.S.C. 2680(h). Quite apart from this, it is plain from the face of the complaint that the allegedly negligent inspection took place at the time the aircraft was converted in Venice, Italy (R. 3-4). Thus the complaint is also barred because it purports to state a claim arising in a foreign country. 28 U.S.C. 2680(k).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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